

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AHMED ELMI)	
Claimant)	
V.)	
)	Docket No. 1,049,411
TYSON FRESH MEATS, INC.)	
Self-Insured Respondent)	

ORDER

Claimant appealed the February 10, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 19, 2015, in Wichita, Kansas.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, claimant stipulated his claim was for a left upper extremity impairment only.

ISSUES

ALJ Fuller awarded claimant benefits for a 10% left upper extremity functional impairment for a left shoulder injury and found claimant is entitled to apply for future medical benefits for his left upper extremity.

Claimant asserts he sustained a 25% left upper extremity functional impairment as opined by Dr. Pedro A. Murati.

Respondent requests the Board affirm the Award.

The issue before the Board is: what is claimant's left upper extremity functional impairment?

FINDINGS OF FACT

Claimant's Application for Hearing alleges a left shoulder injury resulting from a fall at work. He testified that on November 25, 2009, he fell on his left shoulder at work, but he was not asked at the regular hearing to provide details about the fall. He subsequently underwent left shoulder surgery and testified he currently has left shoulder pain. Claimant testified he also has pain from his neck to the bottom of his left hand. He testified the pain "shoots through the nerves in the hand, his left neck, left side of the neck hurts."¹ Claimant has difficulty raising his left arm and moving it to his back.

The reports of Drs. Terrence Pratt, Pedro A. Murati and Peter V. Bieri were stipulated into evidence, but the doctors did not testify. Dr. Pratt's March 16, 2012, report consists of one page. A detailed description of Dr. Pratt's evaluation and opinions is set forth in the Award and is incorporated herein by reference. Dr. Pratt opined claimant had a 10% left upper extremity functional impairment.

Claimant, at his attorney's request, was evaluated by Dr. Murati on April 18, 2013, for injuries claimant suffered in this claim and also for a December 30, 2009, right shoulder injury that is the center of controversy in Docket No. 1,049,412. The doctor previously evaluated claimant for this claim in 2010, but that report was not stipulated into evidence. The history Dr. Murati obtained from claimant does not contain details of how claimant was injured. Dr. Murati did not have a copy of claimant's left shoulder MRI report.

Dr. Murati noted claimant's bilateral upper extremity pronator reflexes were missing and he had a decreased left hand sensation. According to Dr. Murati, a shoulder examination revealed positive rotator cuff and Hawkins examinations, bilaterally. The doctor found a left shoulder impingement and mild glenohumeral crepitus of the shoulders. He noted a carpal compression examination was positive on the left side within 25 seconds. Using a goniometer, Dr. Murati noted restricted left shoulder range of motion. Claimant had trigger points in the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, worse on the left.

Dr. Murati diagnosed claimant with left carpal tunnel syndrome, status post apparent left shoulder Bankart repair and myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals. Dr. Murati opined the diagnoses, within all reasonable medical probability, are a direct result from the work injuries that occurred on November 25 and December 30, 2009.

¹ R.H. Trans at 9.

Utilizing the *Guides*,² Dr. Murati provided claimant a 10% left upper extremity impairment for left carpal tunnel syndrome; a 7% left upper extremity impairment for loss of range of motion of the left shoulder; and a 10% left upper extremity impairment for his left shoulder Bankart repair, which combined for a 25% left upper extremity functional impairment. Dr. Murati stated that his rating might change upon review of the operative report for the left shoulder, which was unavailable for review at the time of the evaluation. The doctor provided claimant with permanent restrictions and recommended at least yearly follow-up appointments for his bilateral upper extremity injuries.

In an August 13, 2013, Order, the ALJ appointed Dr. Bieri to evaluate claimant for rating purposes and restrictions. Dr. Bieri evaluated claimant on November 25, 2013. A friend of claimant's served as an interpreter. The doctor indicated the history and documentation reviewed were generally deficient. The history Dr. Bieri took indicated claimant sustained a left shoulder injury on November 25, 2009, from repetitively using a hook and knife. Dr. Bieri reviewed claimant's medical records, including Dr. Murati's report. Dr. Bieri indicated there were no x-rays to review and his report does not mention the MRI that Dr. Murati referenced.

Dr. Bieri's physical examination of the upper extremities revealed no obvious tissue atrophy. The doctor noted that attempts to measure active range of motion in a valid manner were completely unsuccessful. Dr. Bieri noted claimant's ability to perform repetitive fine and gross motor movements was unimpaired and claimant was unable to apply grip strength using a dynamometer.

Using the *Guides*, Dr. Bieri assessed a 10% left upper extremity permanent functional impairment for claimant's left distal clavicle excision. The doctor indicated claimant was at maximum medical improvement. Dr. Bieri indicated claimant was not under any active care, with the possible exception of taking an over-the-counter medication for pain relief. The doctor stated no other future specific treatment is anticipated.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Dr. Murati was the only physician to diagnose claimant with left carpal tunnel syndrome. That diagnosis appears to be based upon claimant's complaint of numbness and tingling in his hands and a single carpal tunnel compression examination and not upon any diagnostic test results. Drs. Bieri and Pratt did not diagnose claimant with left carpal tunnel syndrome and their reports do not indicate claimant complained of numbness and tingling in his left hand, although claimant did complain of numbness down his left arm to Dr. Pratt. Claimant's Application for Hearing alleges a left shoulder injury resulting from a fall at work. The Board finds claimant failed to prove he sustained a functional impairment for left carpal tunnel syndrome.

Dr. Murati did not have claimant's left shoulder MRI report and indicated his opinion might change upon review of claimant's surgical records. Based primarily on his physical examination, Dr. Murati opined claimant had a 7% left upper extremity impairment for loss of range of motion of the left shoulder and a 10% left upper extremity impairment for his left shoulder Bankart repair, which under the *Guides* combine for a 16% left upper extremity functional impairment.

The Board also has questions concerning the evaluations of Drs. Pratt and Bieri, whose reports are perfunctory. Dr. Pratt was uncertain if there was a left shoulder MRI, but if there was one, it was not provided to him for review. Drs. Pratt and Bieri could not accurately measure claimant's loss of range of motion. Dr. Pratt indicated claimant's motor function revealed generalized giveaway, so the doctor could not use that to evaluate claimant. When Dr. Pratt attempted to assess for crepitus at the left shoulder, claimant had a fear of dislocation and that evaluation was limited. Dr. Bieri's report indicates the history and records he was provided were deficient and his report does not mention a left shoulder MRI. When claimant was examined by Dr. Bieri, a friend of claimant's interpreted, instead of a professional interpreter.

After excluding Dr. Murati's rating for left carpal tunnel syndrome, the Board modifies the Award by averaging the functional impairment opinions of the three physicians and finding claimant has a 12% left upper extremity functional impairment.

CONCLUSION

Claimant sustained a 12% left upper extremity functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³ Accordingly, the findings

³ K.S.A. 2013 Supp. 44-555c(j).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the February 10, 2015, Award entered by ALJ Fuller as follows:

Based upon an average weekly wage of \$591.91, claimant is entitled to receive 25 weeks of temporary total disability compensation at the rate of \$394.63 per week, or \$9,865.75; followed by 24 weeks of permanent partial disability compensation at the rate of \$394.63 per week, or \$9,471.12, for a 12% left upper extremity functional impairment at the level of the shoulder, making a total award of \$19,336.87, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge